

IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF ARKANSAS  
FAYETTEVILLE DIVISION

ROBERT STEVEN MIX

PLAINTIFF

v.

Civil No. 06-5163

PUBLIC DEFENDER'S OFFICE;  
JAY SAXTON, Chief Public  
Defender; and JANETTE  
McKINNEY, Chief Deputy  
Public Defender

DEFENDANTS

**REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE**

Plaintiff's complaint was filed September 1, 2006. He proceed pro se and in forma pauperis. Before the undersigned is the issue of whether the complaint should be served.

**DISCUSSION**

Mix contends his public defender, Janette McKinney, did nothing to defend him against state criminal charges. He names as defendants McKinney, Jay Saxton, the chief public defender, and the Public Defender's Office.

As relief, he asks that McKinney be fired. Mix also asks for compensatory damages.

Mix's claims are subject to dismissal. The defendants are not subject to suit under § 1983. A § 1983 complaint must allege that each defendant, acting under color of state law, deprived plaintiff of "rights, privileges or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. *DuBose v. Kelly*, 187 F.3d 999 (8th Cir. 1999). An attorney does not act under color of state law while representing a client. *Polk County v. Dodson*, 454 U.S. 312, 318, 102 S. Ct. 445, 70 L. Ed. 2d 509 (1981) (public defender does not

act under color of state law when performing traditional functions as counsel); *DuBose v. Kelly*, 187 F.3d 999 (8th Cir. 1999)(“[C]onduct of counsel generally does not constitute action under color of law.”); *Dunn v. Hackworth*, 628 F.2d 1111, 1112 (8th Cir. 1980)(“The actions of privately retained counsel are not considered state action and therefore cannot form the basis of a § 1983 claim.”).

### **CONCLUSION**

I therefore recommend the case be dismissed on the grounds the claims are frivolous or are not cognizable under § 1983. 28 U.S.C. § 1915(e)(2)(B)(i)-(iii)(IFP action, or any portion thereof, may be dismissed on such grounds at any time).

**Mix has ten days from receipt of this report and recommendation in which to file written objections pursuant to 28 U.S.C. § 636(b)(1). The failure to file timely objections may result in waiver of the right to appeal questions of fact. Mix is reminded that objections must be both timely and specific to trigger de novo review by the district court.**

DATED this 14th day of September 2006.

/s/ Beverly Stites Jones  
UNITED STATES MAGISTRATE JUDGE